

International Patent Law is Obsolete

By Anna Mancini

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Anna Mancini asserts in her book, *International Patent Law Is Obsolete*, that modern economic development is slowed by antiquated notions limiting patent law protection to material innovations. She states that the international agreements and copyright laws which have supplanted international patent law for protection of software and semiconductors are inadequate. She believes this situation causes international tension and legal insecurity for evolving technological markets. To address this problem, the author stresses international patent law must be adapted for the emerging virtual world and intangible industrial inventions. Unfortunately, the author fails to lay the groundwork for the premise of her argument with a comprehensive overview of the history and current state of international patent law. Instead, she briefly summarizes French denial of software patentability, and mentions in passing the emergence of related American and German laws regarding software patentability.

The author asserts French denial of software patentability in 1968 was driven by political considerations. At the time, the French Senate supported patentability if the software led to an industrial result. In contrast, the French National Assembly believed software patents would encourage individuals to patent mathematical formulae and other abstract innovations. The author characterizes the French debate over software patentability as artificial. She attributes the

problem to psychological pressure from the Americans, who were encouraging denial of software patentability. An additional problem was that French politicians were unwilling to give the courts power to determine software patentability. Moreover, French politicians feared foreign monopolies, unprotected in their own countries, would paralyze the French information technology market.

After describing how the political climate surrounding passage of the 1968 French Patent Act doomed software patentability, the author explains the impact of the 1968 Patent Act on court decisions. The author notes two French cases, *Mobile Oil* (1973) and *Schlumberger* (1981), to highlight failed efforts to acquire industrial process software patents in the wake of the 1968 French Patent Act. She does not explain the cases in detail, or elaborate on their relevance to modern international patent issues. Without citing more recent French case law, the author merely asserts that processes involving software should be distinguished and made patentable. In support of this premise, she cites an American case “*Diehr et Bradley*,” which allowed a patent claim to cover a mathematical formula and a programmed digital computer for operation of a rubber-molding process.¹ She states this case proves French politicians were wrong in their 1968 assumptions of how the Americans would handle software patentability.

The author notes that by 1973, most European countries adapted their laws to comply with Article 52 of the European Patent Convention, which denied software patentability. Even the Germans, who favored software patentability until 1974, soon adopted a more restrictive

¹ The author does not cite “*Diher et Bradley*.” Presumably, she refers to *Diamond v. Diher*, 450 U.S. 175 (1981) (holding as a valid a patent claim involving a mathematical formula and a programmed digital computer for operation of a rubber-molding process because it was merely a process for molding rubber products and not an attempt to patent a mathematical formula).

position. The author argues international failure to distinguish unpatenable software, and patentable processes requiring software, created problems. Although the Technical Board of Appeal of the European Patent Office recognized the patentability of some computer implemented inventions, member states were not bound by Board decisions. The author asserts resulting disparities between countries led “European institutions” to propose a “directive” on computer implemented inventions to harmonize protection. She does not specify what institutions were involved, and what directive was promulgated. She asserts divergent views on software patentability caused a “split of the international patent system.” While the author presents an interesting issue, her presentation of supporting material is weak.

According to the author, the “split of the international patent system” instigated by computer software has been perpetuated by regulations pursuant to semiconductor chips. She contends the United States forced other countries to institute unique legal protections for semiconductor chips, outside of the existing international patent system. She does not explain why such a system of protection for semiconductors is problematic.

The author notes Americans attempted to bolster intellectual property protection through international conventions, international agreements such as the General Agreement on Tariffs and Trade (GATT), and by joining the Berne Convention during the Regan and Bush administrations. According to her, the European Parliament was unhappy with Americans, stating American law was aimed at unilateral redefinition of GATT principles through reciprocity. For instance, the 1984 Semiconductor Chip Protection Act promoted registration of semiconductor chips under copyright law. Because the Act required reciprocity for protection of foreign semiconductor chips, other countries moved quickly to align their laws with the Americans. Although the author negatively views protection of semiconductor chips outside of

the patent law framework, she states such action by the United States was necessary in the face of international uncertainty on how industrial abstract creations should be protected.

At this point in the book, the author sets off on a tangential discussion of legal positivism that is poorly connected to the preceding discussion on semiconductor chips. The author seems to argue that a lack of pragmatism confines attorneys to study positive law, which presents enormous problems when new situations arise from scientific and technical developments. She says in patent law, legal positivism has confined lawyers to discourse about the rules and legal requirements for patentability. Apparently she believes this situation prevents consideration of the philosophical principles giving rise to the creation of patent law and amendment of patent law in accordance with modern changes. The author states it is necessary to modernize and humanize the international patent system.

The author attributes the present decay of the international patent system to the principles of assimilation inherent in the 1883 Paris Convention for the Protection of Industrial Property which caused countries to forfeit reciprocity rights. She believes the “national treatment rule” prevented countries protecting software under patent law and requiring reciprocity.² The author

² The National Treatment For Nationals of Countries of the Union, Article 2 of the Paris Convention for the Protection of Industrial Property, states “Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.”

contends this was the major reason behind the French decision to deny patentability to software in 1968. She stresses the forfeiture of future rights is inappropriate, and has caused adverse consequences for participating countries' information technology industries. She proposes the Paris Convention allow member states to determine patentability of new inventions and demand reciprocity. She is convinced such an amendment would allow any state to contribute to a worldwide, balanced and efficient patent system. She does not detail how her recommendations will lead to such a result.

The author proposes to improve the current status of the international patent system by amending Article 2 of the Paris Convention to limit the national treatment requirement and allow for reciprocity of future rights. Her goal is to facilitate development of domestic patent laws protecting intangible inventions. She also presents similar language to update domestic patent laws. Her recommendations limit patentability of intangible inventions to those which do not copy existing intangible inventions.

Additionally, her proposed language allows courts to determine patent infringement without "verification of novelty" regardless of whether circumstances indicate pirated dealings. She asserts this language will "allow us to benefit from the theory of piracy dealings but avoid its drawbacks." The author fails to explain the theory underpinning her recommendations, other than to say it is an emerging trend. She merely urges her recommended language be applied in conjunction with civil liability and unfair competition laws to prevent patent protection of unlimited duration. Finally, the author's recommended patent application language requires a description of the functioning utility and performance of the intangible invention, in addition to a copy of the intangible invention, supporting documentation, and designs "as are necessary to

permit its use and reconstitution.” The author recommends similar language be adopted to enable new intangible industrial inventions to be patented under French patent law.

The conclusion of the book is as confusing as the preceding chapters. The author reiterates that the “national treatment rule” regarding future rights under Article 2 of the Paris Convention needs to be replaced to prevent any one country from imposing its will on others. She states patent law should foster technical and scientific progress and consider “quality of life and respect of the environment.” She advocates establishing better international decision making processes to limit application of new scientific discoveries. She ends by stating modern international patent law should be a legal tool for the international community to avoid natural catastrophes provoked by blind application of scientific discoveries. According to the author, none of these issues can be addressed as long as international patent law remains, in her opinion, imbalanced and obsolete.

I do not recommend this book be used as a legal patent law resource or as leisurely reading material. The majority of the text is unsupported by in depth citations to authoritative sources. Although the book is marketed as having been published in January 2006, the most recent work referenced is a 1991 study. Additionally, basic grammar and punctuation errors distract the reader throughout the book. Finally, Ms. Mancini asserts that international patent law is obsolete, however, her anemic analysis of the current state of international patent law provides no useful foundation for her final recommendations.